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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 453

HORTON R. PRUDDEN,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

CHESTER BEDELL
Counsel
C. HARRIS DITTMAR
Counsel of Record
1520 Barnett Bank Building
Jacksonville, Florida 32202
For Petitioner

BEDELL, BEDELL, DITTMAR, SMITH & ZEHMER
1520 Barnett Bank Building
Jacksonville, Florida 32202
Of Counsel

INDEX

	Page
Citations to Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statement of the Case	4
Reasons for Granting the Writ	7
Conclusion	23

Appendix

Opinion of the United States District Court for the Middle District of Florida	App. 1
Opinion of the United States Court of Appeals for the Fifth Circuit	App. 5
Opinion on Rehearing and Rehearing En Banc	App. 35

CITATIONS

CASES

	Page
Bumper v. *North Carolina* (1968), 391 U.S. 543, 88 S.Ct. 1788, 20 L. Ed. 2d 797	9
Cohen v. *United States* (8th Cir. 1968), 405 F. 2d 34, *cert. denied* (1969), 394 U.S. 943, 89 S. Ct. 1274	19
Frohmann v. *United States* (8th Cir. 1967), 380 F. 2d 832	21
Kohatsu v. *United States* (9th Cir. 1965), 351 F. 2d 898	22
Kovach v. *United States* (6th Cir. 1931), 53 F. 2d 639	11, 12
Miranda v. *Arizona* (1966), 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694	3, 6, 14, 15, 17
Muse v. *United States* (8th Cir. 1968), 405 F. 2d 40	19
Rigby v. *United States* (D.C. Cir. 1957), 247 F. 2d 584	11
Schlinsky v. *United States* (1st Cir. 1967), 279 F. 2d 735, *cert. denied*, 389 U.S. 920, 88 S. Ct. 236, 19 L. Ed. 2d 265	21
Schoepflin v. *United States* (9th Cir. 1968), 391 F. 2d 390	10
Spinney v. *United States* (1st Cir. 1967), 385 F. 2d 908, *cert. denied* (1968), 389 U.S. 921, 88 S. Ct. 854, 19 L. Ed. 2d 981	20
Taglianetti v. *United States* (1st Cir. 1968), 398 F. 2d 558, *per curiam aff'd* (1969), 394 U.S. 316, 89 S. Ct. 1099, 22 L. Ed. 2d 302	20
United States v. *Dickerson* (7th Cir. 1969), 413 F. 2d 1111	5, 6, 14

CITATIONS—Continued

	Page
United States v. *Heffner* (4th Cir. 1969), 420 F. 2d 809	16
United States v. *Luna* (W.D. Tex. 1970), — F. Supp. — [70-2 USTC ¶ 9498]	17
United States v. *Mackiewicz* (2d Cir. 1968), 401 F. 2d 219, *cert. denied*, 393 U.S. 923, 89 S. Ct. 253	20
United States v. *Mansfield* (7th Cir. 1967), 381 F. 2d 961, *cert. denied*, 389 U.S. 1015, 88 S. Ct. 593, 19 L. Ed. 2d 661	20
United States v. *Middleton* (D. Minn. 1970), — F. Supp. — [70-2 USTC ¶ 9499]	17
United States v. *Page* (9th Cir. 1962), 302 F. 2d 81	9, 10
United States v. *Smith* (2d Cir. 1962), 308 F. 2d 657	11
United States v. *Tonahill* (5th Cir. 1970), — F. 2d — [Case No. 29426, July 13, 1970]	12, 13
Wren v. *United States* (10th Cir. 1965), 352 F. 2d 617	12

CONSTITUTIONAL PROVISIONS:

United States Constitution, Amendment IV	3
United States Constitution, Amendment V	3
United States Constitution, Amendment VI	4

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Petitioner, Horton R. Prudden, prays that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 10, 1970.

Citations to Opinions Below

The order of the United States District Court for the Middle District of Florida entered June 6, 1969 (App. 1-4), is reported at 305 F.Supp. 110. The opinion of the Court of Appeals for the Fifth Circuit entered April 10, 1970 (App. 5-34), is reported at 424 F.2d 1021. The order of the Court of Appeals on Petition for Rehearing and Petition for Rehearing En Banc, entered June 26, 1970 (App. 35), is not

reported. Each of said opinions and orders is appended to this Petition.

Jurisdiction

The judgment of the Court of Appeals was entered on April 10, 1970. The order denying the Petition for Rehearing was entered on June 26, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

I.

Whether the trial judge's order which suppressed evidence obtained from defendant-petitioner Prudden during a criminal investigation of the defendant by the Internal Revenue Service because the trial judge found that "the Internal Revenue Service agents engaged in a deliberate scheme to deceive defendant in order to prevent his suspecting . . . the nature of the investigation" (App. 3) and that the evidence was "obtained from defendant . . . by fraud, deceit, and trickery" (App. 2), was erroneously reversed by the Court of Appeals upon the appellate court's conclusion that the "record does not clearly and convincingly demonstrate a deliberate scheme to deceive" (App. 6), and that the defendant "did not sustain the burden that was his of demonstrating that fraud, deceit or trickery were present" (App. 27) by a "showing [which] must be clear and convincing." (App. 30).

II.

Whether, on a motion to suppress evidence obtained from the defendant without process of court, the burden is on the Government to prove by clear and convincing evidence that the defendant furnished the evidence voluntarily, or the burden is on the defendant to prove by clear and convincing

evidence that "fraud, deceit or trickery were present." (App. 27).

III.

Whether the Special Agent was required to give defendant the *Miranda* warnings when the tax investigation became a criminal investigation focused on defendant.

IV.

Whether the Special Agent was required to give the defendant a minimum warning that the tax investigation had changed into a criminal investigation and that he had a Fifth Amendment right to refuse to produce evidence against himself.

Constitutional Provisions Involved

This case involves the Fourth, Fifth and Sixth Amendments to the Constitution of the United States, which provide in part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ."
>
> Constitution of the United States, Amendment IV.

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."
>
> Constitution of the United States, Amendment V.

"In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . . and to have the Assistance of Counsel for his defence."

Constitution of the United States, Amendment VI.

Statement of the Case

The defendant-petitioner was indicted for tax fraud on February 15, 1967 following an investigation by agents of the Internal Revenue Service which began on May 10, 1963. Defendant moved the trial court to suppress all statements and documentary evidence which were obtained from defendant following the time that the original tax audit by Revenue Agent Lexow became a criminal investigation of defendant under the control of Special Agent Cohen. At the pre-trial evidentiary hearing on defendant's motion to suppress, the Government contended that the documentary evidence and statements furnished by defendant to Special Agent Cohen were voluntarily furnished. Defendant contended that the evidence and statements were furnished as a result of fraud, deceit and trickery practiced by the agents. In response, the Government contended that even if its agents engaged in fraud, deceit and trickery, the evidence and statements should not be suppressed.

The trial court entered its order suppressing the evidence and statements based on the trial court's findings that the investigation which began as a civil tax audit conducted by Revenue Agent Lexow became a full criminal investigation of defendant on August 14, 1963 when it was taken over by Special Agent Cohen (App. 2); that, on August 29, 1963, Revenue Agent Lexow wrote defendant a letter falsely in-

forming defendant that the investigation had been transferred to Revenue Agent Stanley for further examination of the returns (whereas in truth and in fact the investigation had been transferred to Special Agent Cohen to determine and collect proof of criminal charges against defendant), and urging defendant to cooperate with Revenue Agent Stanley as defendant had previously cooperated with Revenue Agent Lexow (App. 3); that thereafter Special Agent Cohen and Revenue Agent Stanley "conducted a complete criminal investigation with the cooperation of defendant, who was unaware that the new nature of the investigation gave him a right to refuse to produce evidence against himself" (App. 3); that "it is clear that the Internal Revenue Service agents engaged in a deliberate scheme to deceive defendant in order to prevent his suspecting that the nature of the investigation had altered materially" (App. 3); and that "considering all the circumstances surrounding the transformation of the investigation into a criminal one, the evidence obtained from defendant after August 14, 1963, was obtained by fraud, deceit and trickery." (App. 2).

The Government chose to appeal the suppression order rather than to proceed to trial. On its appeal the Government contended that the actions of the Internal Revenue Service agents did not constitute fraud, deceit, trickery or subterfuge, but argued that "even if there was some [fraud, deceit, trickery or subterfuge], the Motion to Suppress still should not have been granted." (Brief of Appellant, p. 13.) The defendant contended that the findings of fact made by the trial court must stand unless shown to be clearly erroneous and that the finding that the evidence was obtained by fraud, deceit and trickery fully supported the order suppressing that evidence. The defendant, specifically relying on the decision of the Court of Appeals for the Seventh Circuit in *United States* v. *Dickerson* (7th Cir. 1969), 413 F.2d 1111, further

contended that the evidence was properly suppressed because he was not given the warnings required by *Miranda* v. *Arizona* (1966), 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.

The Court of Appeals held that the Seventh Circuit's opinion in *Dickerson* was "an unwarranted extension of the *Miranda* decision" (App. 17) and expressly declined to follow it (App. 18) saying:

> "*Miranda* warnings are not constitutionally required in tax investigation cases where the taxpayer is not deprived of his freedom and is not actually compelled or coerced to furnished statements or documents."
>
> (App. 22).

The Court of Appeals rejected "the government's contention that the agents were free to use fraud, deceit or trickery" (App. 27) but held that the trial court's "ultimate fact finding – fraud, deceit and trickery by the agents – is a mistaken one" (App. 26), because:

> "the record does not *clearly and convincingly* demonstrate a deliberate scheme to deceive" [emphasis added]
>
> (App. 6)

and because:

> "Prudden, as the moving party in the motion to suppress, did not sustain the burden that was his of demonstrating that fraud, deceit or trickery were present. . . ."
>
> (App. 27)

"by clear and convincing proof."

App. 30)

Reasons for Granting the Writ:

1. In holding that the statements and documentary evidence were improperly suppressed because the defendant did not sustain the burden of demonstrating by clear and convincing proof that fraud, deceit or trickery were present, the Court of Appeals for the Fifth Circuit has rendered a decision in conflict with applicable decisions of this Court and decisions of the Courts of Appeals for the Second, Sixth, Ninth, Tenth and District of Columbia Circuits, which hold that the burden of proof is on the Government to prove by clear and convincing evidence that the defendant voluntarily produced the evidence sought to be suppressed.

The trial judge's order suppressing the statements and documentary evidence obtained from defendant after the original tax investigation became a criminal investigation of the defendant was based on the trial judge's finding that "the Internal Revenue Service agents engaged in a deliberate scheme to deceive defendant in order to prevent his suspecting . . . the nature of the investigation" and that, "considering all the circumstances surrounding the transformation of the investigation into a criminal one, the evidence obtained from defendant after August 14, 1963, was obtained by fraud, deceit and trickery." (App. 2, 3) The trial judge who heard the testimony of all of the witnesses, including Revenue Agents Lexow and Stanley, Special Agent Cohen and defendant Prudden, and who, unlike the Court of Appeals, had an opportunity to observe their demeanor on the stand, was in the best position to judge the credibility of the witnesses, to draw proper inferences from the evidence and to make findings of fact. The trial judge set forth in his order some of the facts and circumstances which led to the ultimate

findings of fact, giving particular importance to a letter written by Revenue Agent Lexow on August 29, 1963, which falsely informed defendant that the returns had been transferred to Revenue Agent Stanley for further examination, whereas in truth and in fact the investigation had been transferred to Special Agent Cohen to determine and collect proof of criminal charges against defendant.

The Court of Appeals, pointing out that Revenue Agent Lexow denied in his testimony any guile or intent to deceive (App. 31-32), held that the evidence relied on by the trial judge in finding fraud, deceit and trickery by the agents was insufficient to carry the defendant's burden of proving fraud, deceit or trickery by clear and convincing proof (App. 27-30). The Court held:

> "If the evidence obtained subsequent to Special Agent Cohen's entry into the investigation were the result of an unreasonable search in violation of the Fourth Amendment, then it would have to be suppressed. Prudden also asserts violation of Fifth and Sixth Amendment rights. Since all claimed violations depend upon a showing of the existence of fraud, deceit or trickery, it is not necessary to discuss each constitutional claim separately. Prudden postulates that the search was unreasonable because his consent to examine the records was obtained by fraud, deceit and trickery. While we recognize that fraud, deceit and trickery in obtaining access to incriminating evidence can make an otherwise lawful search unreasonable, Prudden, as the moving party in the motion to suppress, did not sustain the burden that was his of demonstrating that fraud, deceit or trickery were present. . . ."
>
> (App. 26-27).

"by clear and convincing proof . . ."

(App. 30).

In holding that the defendant had the burden to prove by clear and convincing evidence that an alleged unreasonable search violated his Fourth Amendment rights because his consent was obtained by fraud, deceit and trickery, the decision of the Court of Appeals is in direct conflict with applicable decisions of this Court and decisions of other courts of appeal which hold that the burden is on the Government to prove by clear and convincing evidence that the search was voluntarily consented to with full knowledge of defendant's rights involved.

In *Bumper* v. *North Carolina* (1968), 391 U.S. 543, 88 S.Ct. 1788, 20 L.Ed.2d 797, this Court held:

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority."
>
> 391 U.S. at 548-49,
> 88 S.Ct. at 1792.

The conflicting holdings of other courts of appeal are as follows:

> "Because of the importance of preserving constitutional rights, various rules have been stated for the guidance of the trial judge in determining whether consent to the search was in fact given. The government must prove that consent was given. It must show that there was no duress or coercion, express or implied. The consent must be 'unequivocal and specific'

and freely and intelligently given'. There must be convincing evidence that defendant has waived his rights. There must be clear and positive testimony. 'Courts indulge every reasonable presumption against waiver' of fundamental constitutional rights'."

United States v. *Page* (9th Cir. 1962), 302 F.2d 81, 83-84.

"In applying this principle in the area of searches and seizures this court has prescribed the following test to be used in determining whether there has been a waiver of the constitutional right:

> 'Such a waiver cannot be conclusively presumed from a verbal expression of assent. The court must determine from all the circumstances whether the verbal assent reflected an understanding, uncoerced, and unequivocal election to grant the officers a license which the person knows may be freely and effectively withhold.' Cipres v. United States, 9 Cir., 343 F.2d 95, 97.

"In view of this test, the trial court determination that there had been an effective waiver cannot stand unless there is implicit therein a finding of fact that, under the described circumstances, the words used by Smith reflected (1) an understanding, (2) uncoerced, and (3) unequivocal election to grant the officers a license which (4) Smith knew may be freely and effectively withheld.

"If such a finding is not implicit in the trial court's denial of the motion to suppress the court erred in receiving the evidence."

Schoepflin v. *United States* (9th Cir. 1968), 391 F.2d 390, 398.

"Quite apart from the burden normally devolving upon the accused to demonstrate alleged illegality in the procurement of evidence, we have pointed out that if the Government relies upon consent and alleges the absence of intimidation and duress, it has the burden of convincing the court that they are in fact absent. . . ."

Rigby v. *United States* (D.C. Cir. 1957), 247 F.2d 584, 585.

"The principles which govern us have been well stated in previous opinions. When an accused consents to a search or seizure conducted without a search warrant, the protection he would have enjoyed under the Fourth Amendment is lost to him. United States v. Bianco, 96 F.2d 97 (2 Cir. 1938); United States v. Shules, 65 F.2d 780 (2 Cir. 1933). However, an accused's voluntary consent must be proven by clear and positive evidence. A consent is not a voluntary one if it is the product of duress or coercion, actual or implicit. Moreover, to be voluntary, a consent must have been unequivocal, specific, and intelligently given. Judd v. United States, 89 U.S.App.D.C. 64, 190 F.2d 649, 651 (1951); see Amos v. United States, 255 U.S. 313, 41 S.Ct. 266, 65 L.Ed. 654 (1921); Karwicki v. United States, 55 F.2d 225, 226 (4 Cir. 1932) (per curiam); Kovach v. United States, 53 F.2d 639 (6 Cir. 1931) (per curiam); United States v. Kelih, 272 F. 484, 490-491 (S.D. Ill. 1921)."

United States v. *Smith* (2d Cir. 1962), 308 F.2d 657, 663.

"Where officers making the search of a dwelling were not acting under a search warrant, the burden is on the government to show that the owner voluntarily

consented to the search, and the consent can not be deemed voluntary, unless it be made clearly to appear that it was freely and intelligently given."

Kovach v. *United States* (6th Cir. 1931), 53 F.2d 639.

"It is fundamental in our judicial process, as guaranteed by the Fourth Amendment, that we are secure in our persons, houses, papers and effects against unreasonable searches and seizures. This constitutional right, like all others, may be waived by voluntary consent. In order to constitute a voluntary consent it must clearly appear that the search was voluntarily permitted or expressly invited and agreed to by the person whose right is involved. In addition, such person must be cognizant of his rights in the premises, the consent must not be contaminated by any duress or coercion and the government has the burden of proof."

Wren v. *United States* (10th Cir. 1965); 352 F.2d 617, 618.

The Fifth Circuit's holding that the burden rests on defendant to prove by "clear and convincing evidence" that a Government-claimed waiver of his constitutional rights was not voluntary, but was induced by fraud, deceit and trickery, introduces a novel and dangerous precedent into the federal case law. It has already been accepted as controlling and followed by a separate panel of the Court of Appeals for the Fifth Circuit:

"We find no distinction between the instant case and *Prudden* which justifies different results in the two cases. Of course, there is no question, as *Prudden* pointed out, that Revenue Agents cannot obtain information from taxpayers by fraud, trickery or deceit

which misrepresents the nature of the search. But there must be acts by the agent[s] which *materially* misrepresent the nature of the inquiry before there is fraud, trickery or deceit and the record . . . must disclose some affirmative misrepresentation to establish the existence of fraud, and *this showing must be clear and convincing.*' *Prudden* slip opin. at p. 28-30 (emphasis added).

"We cannot say on this record that there was a *material* misrepresentation which *clearly* and *convincingly* shows fraud and the defendant has therefore failed to meet his burden. . . ."

United States v. *Tonahill* (5th Cir. 1970), ... F.2d ..... [Case No. 29426, July 13, 1970].

The conflicting decisions of this Court and other courts of appeal are correct in holding that the Government has the burden of proving by clear and convincing evidence that defendant voluntarily waived his constitutional rights in producing evidence; and this Court should therefore grant its writ of certiorari to review and reverse the Fifth Circuit's holding to the contrary.

2. In holding that "Miranda warnings are not constitutionally required in tax investigation cases where the taxpayer is not deprived of his freedom and is not actually compelled or coerced to furnish statements or documents" (App 22) the Court of Appeals for the Fifth Circuit:

a. has rendered a decision in conflict with a decision of the Court of Appeals for the Seventh Circuit on the same matter; and

b. has decided an important question of federal law which has not been, but should be, settled by this Court.

At the time of the evidentiary hearing on the motion to suppress on May 15, 1969 controlling decisions of the Court of Appeals for the Fifth Circuit held that a taxpayer questioned by a special agent was not entitled to full *Miranda* warnings. Accordingly, defendant did not base his motion to suppress on the *Miranda* decision, but defendant's counsel specifically announced that defendant was not waiving his contention that he was entitled to full *Miranda* warnings under the provisions of the Fifth and Sixth Amendments to the United States Constitution.

On July 28, 1969 the Court of Appeals for the Seventh Circuit held in *United States* v. *Dickerson* (7th Cir. 1969), 413 F.2d 1111:

> "Our conclusion is that *Miranda* warnings must be given to the taxpayer by either the revenue agent or the special agent at the inception of the first contact with the taxpayer after the case has been transferred to the Intelligence Division."
>
> 413 F.2d at 1116-17.

The Court of Appeals for the Fifth Circuit held that the Seventh Circuit's opinion in *Dickerson* was "an unwarranted extension of the *Miranda* decision" (App. 17) and expressly declined to follow it (App. 18), holding:

> "*Miranda* warnings are not constitutionally required in tax investigation cases where the taxpayer is not deprived of his freedom and is not actually compelled or coerced to furnish statements or documents."
>
> (App. 22).

The question of whether a taxpayer who has become the focal point of a criminal investigation by a special agent is entitled to *Miranda* warnings is an important question of federal law which has not been, but should be, settled by this Court. It is not fair or logical that citizens of the Seventh Circuit now enjoy court recognition that taxpayers do have a constitutional right to *Miranda* warnings in such circumstances, while citizens of the Fifth Circuit live under a court ruling that taxpayers do not have such a constitutional right.

It is insufficient and incorrect to dismiss this important question of federal law, as the Court of Appeals for the Fifth Circuit has done, with the suggestion that new Internal Revenue Service policy regulations limit the scope of the problem and render moot any future effect of that court's decision:

> "Though not as circumscribed as *Dickerson*, our holding here may have limited effect as precedent for the same reason mentioned in note 8, supra. Since May of 1967 the Internal Revenue Service has required Special Agents to give the taxpayer all essential *Miranda* warnings and advice at their initial conference. See I.R.S. News Release IR-949 (1969 CCH Fed.

> Tax Rptr. ¶6946). The Fourth Circuit has recently held that in tax investigations occurring after the inception of this policy the IRS is required to comply with its own rule on the basis of United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954). United States v. Heffner, 420 F.2d 809 (4th Cir. 1969)."
>
> (App. 23, n. 14).

Reported decisions already reflect that special agents are not following the policy announced by the Internal Revenue Service, and that the courts are not following the Fourth Circuit's holding in *United States* v. *Heffner* (4th Cir. 1969), 420 F.2d 809, (compelling the IRS to comply with its own regulation):

> "Defendant claims that he was not advised of and did not waive his rights before being questioned as required by *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The Court finds that none of the statements complained of were gained through 'custodial interrogation,' and that *Miranda* does not apply. See *United States* v. *Prudden*, No. 28140, 5th Cir., April 10, 1970 [70-1 USTC ¶9336], and cases cited therein. Defendant next contends that *IRS News Release No.* 897, issued October 3, 1967, required such warnings and waiver regardless of whether *Miranda* did, citing *United States* v. *Heffner*, [70-1 USTC ¶9152], 420 F.2d 809 (4th Cir. 1969). This Court declines to follow *Heffner*. The cases cited in the majority's opinion in *Heffner* dealt with reversals of final agency action because the administrative procedure adopted by the agency was not followed. None dealt with the exclusion of evidence in a federal criminal trial, and hence none, including *Heffner*, weighed the possible value of con-

sistent agency procedures with the need for evidence relevant to the truth sought in a federal criminal trial. While the need to enforce rights granted by the Constitution and laws of the United States may outweigh the interests mitigating against the exclusion of otherwise admissible evidence, the enforcement of an agency policy statement does not, regardless of how desirable that policy might be. The Constitution and laws may of necessity dictate preconditions for the admissibility of evidence in a federal trial; administrative agencies may not."

> *United States* v. *Luna* (W.D. Tex. 1970) ..... F.Supp. ..... [70-2 USTC ¶ 9498]. *See also United States* v. *Middleton* (D. Minn. 1970), ... F.Supp. ..... [70-2 USTC ¶ 9499].

It is important that this Court determine once and for all whether taxpayers involved in criminal investigations do have a constitutional right to *Miranda* warnings. It should no longer remain a matter subject to the whim of individual special agents.

3. In holding that defendant was not entitled to any warning whatsoever from the Special Agent, the Court of Appeals for the Fifth Circuit rendered a decision in conflict with decisions of the Court of Appeals for the First, Second, Seventh, Eighth and Ninth Circuits which recognize that a taxpayer is entitled to a minimum warning that the Special Agent is making a criminal investigation and that the taxpayer has a Fifth Amendment right to refuse to produce evidence against himself.

The Court of Appeals for the Fifth Circuit accepted as correct Special Agent Cohen's understanding that all he "was required to do by the then existing Internal Revenue Service requirements was to tell Prudden that he was a Special Agent and show Prudden his credentials" (App. 28), and held:

> "We conclude that the mere failure of a revenue agent (be he regular or special) to warn the taxpayer that the investigation may result in criminal charges, absent any acts by the agent which materially misrepresent the nature of the inquiry, do not constitute fraud, deceit and trickery. Therefore, the record here must disclose some affirmative misrepresentation to establish the existence of fraud, and this showing must be clear and convincing."
>
> (App. 30).

In so holding, the Court of Appeals for the Fifth Circuit aligned itself in opposition to the decisions of several other Courts of Appeal which have held that evidence was properly obtained from a taxpayer because the special agent gave a minimum warning that the investigation was criminal and the taxpayer did not have to furnish any information.

Thus, in *Muse* v. *United States* (8th Cir. 1968), 405 F.2d 40, the special agent warned the defendant that

> "'Under the Constitution of the United States you have the right to refuse to answer questions or make any statement which may tend to incriminate you under the laws of the United States. Anything you say, any evidence you produce may be used against you in any proceeding which may hereafter be undertaken by the United States.'"

405 F.2d at 41.

The special agent also told the defendant "'it looked as if criminal prosecution would be recommended'" (405 F.2d at 41). On these facts, it was held that the statements made by the defendant "were not obtained by misrepresentation, fraud or coercion, and were voluntarily given" (405 F.2d at 41).

In *Cohen* v. *United States* (8th Cir. 1968), 405 F.2d 34, *cert. denied* (1969), 394 U.S. 943, 89 S.Ct. 1274, the defendant, on the second visit by the special agent, was advised

> "that he need not answer any questions which tended to incriminate him [and] he responded to this warning by saying that he understood but saw no reason not to answer."

405 F.2d at 35.

On these facts, it was found that the defendant's records and statements "were not obtained by misrepresentation, fraud or coercion . . . and were voluntarily given . . . ." (405 F.2d at 35-36).

In *United States* v. *Mackiewicz* (2d Cir. 1968), 401 F.2d 219, *cert. denied*, 393 U.S. 923, 89 S.Ct. 253, the special agent, on his first visit,

> "told Mr. Mackiewicz that he did not have to answer any questions or produce any documents which might incriminate him. The agent repeated this, and Mr. Mackiewicz indicated, by an affirmative nod, that he understood."

401 F.2d at 220-21.

The court held, on these facts, that the defendant had "consented to answer the questions and to the asserted search and seizure of documents" (401 F.2d at 221).

In *Taglianetti* v. *United States* (1st Cir. 1968), 398 F.2d 558, *per curiam affirmed* (1969), 394 U.S. 316, 89 S.Ct. 1099, 22 L.Ed.2d 302, the court found that the defendant "was informed that anything he might say could be used against him at 'any proceedings which might hereafter be undertaken by the United States'" (398 F.2d at 567). On these facts, the court held that the defendant was not "the victim of fraud or trickery" (398 F.2d at 566).

In *Spinney* v. *United States* (1st Cir. 1967), 385 F.2d 908, *cert. denied* (1968), 390 U.S. 921, 88 S.Ct. 854, 19 L.Ed.2d 981, the transcription of the interview which the defendant sought to suppress reflected a complete and specific warning of the defendant's rights under the Fifth Amendment.

In *United States* v. *Mansfield* (7th Cir. 1967), 381 F.2d 961, *cert. denied*, 389 U.S. 1015, 88 S. Ct. 593, 19 L. Ed. 2d 661, the special agents warned the defendant on their first visit

> "that the matter had been referred to the special agents' office which looked into these matters to see whether there had been any wilful attempt to evade and defeat

> taxes, that there was a possibility of criminal prosecution and that Dr. Mansfield did not have to talk to the agents or show them any records."
>
> 381 F.2d at 962-63.

On these facts, the court held that the failure of a special agent to repeat this warning at a subsequent meeting did not amount to subterfuge and misrepresentation.

In *Frohmann* v. *United States* (8th Cir. 1967), 380 F. 2d 832, the defendant attended a conference with the special agent, at which his attorney was present. At the conference the defendant was advised

> "that he had a right not to answer any question [and] Frohmann replied that he 'did not intend to use that privilege, he would give us anything we wanted.'"
>
> 380 F. 2d at 835.

On these facts, the court rejected the defendant's argument that an admission made at the conference was inadmissible because he had not been warned of his right to counsel.

In *Schlinsky* v. *United States* (1st Cir. 1967), 279 F. 2d 735, *cert. denied*, 389 U.S. 920, 88 S. Ct. 236, 19 L. Ed. 2d 265, the special agent

> "at his first meeting with the defendant advised him that he need not answer any questions, that he need not produce any records that might incriminate him and that he could terminate the interview at any time."
>
> 379 F. 2d at 738.

On these facts, the Court of Appeals affirmed the trial court's finding "that defendant's actions were voluntary" (379 F. 2d at 738).

In *Kohatsu v. United States* (9th Cir. 1965), 351 F. 2d 898, one of the special agents

> "testified that he advised appellant 'as to his constitutional rights' and told him that he did not have to 'say anything or offer any document which might tend to incriminate him under any of the federal laws', and that 'Mr. Kohatsu said that he understood.'"
>
> 351 F. 2d at 900.

The court found, on the facts

> "that all statements made and all documents delivered were voluntary acts of the appellant and were not induced by stealth, trickery or misrepresentation."
>
> 351 F. 2d at 902.

Prudden was entitled to the minimum warnings which was approved by the foregoing decisions of the Court of Appeals for the First, Second, Seventh, Eighth and Ninth Circuits. The decision of the Court of Appeals for the Fifth Circuit is erroneous in holding that he was entitled to no warning whatever.

CONCLUSION

The trial judge heard the testimony of the witnesses, observed the demeanor of each on the stand, and found that "the evidence obtained from defendant after August 14, 1963, was obtained by fraud, deceit and trickery." (App. 2.) In the circumstances, the trial judge did not think the evidence should be used against the defendant in this criminal prosecution and therefore entered his order suppressing the evidence. The Court of Appeals has now ruled that this evidence may be used against the defendant because he failed to prove fraud, deceit and trickery "by clear and convincing proof" (App. 30).

Unless this Court grants its writ of certiorari for the reasons set forth herein and reverses the judgment of the Court of Appeals for the Fifth Circuit, defendant will be forced to go on trial on evidence which would not be usable against him in the First, Second, Sixth, Seventh, Eighth, Ninth, Tenth, and District of Columbia Circuits. Accordingly, the case is a classic one for the issuance of this Court's discretionary writ.

Respectfully submitted,

CHESTER BEDELL
Counsel.

C. HARRIS DITTMAR
Counsel of Record

1520 Barnett Bank Building
Jacksonville, Florida 32202

For Petitioner

BEDELL, BEDELL, DITTMAR, SMITH & ZEHMER
1520 Barnett Bank Building
Jacksonville, Florida 32202

Of Counsel

UNITED STATES of America

v.

Horton R. PRUDDEN.

No. 67 84 Cr-J.

United States District Court
M. D. Florida,
Jacksonville Division.

June 6, 1969.

305 F. Supp. 110

ORDER

WILLIAM A. McRAE, Jr., District Judge.

An evidentiary hearing was held on Defendant's Motion to Suppress in the above styled case on May 15, 1969. Defendant seeks to suppress certain statements and evidence obtained in the course of an income tax investigation and as the grounds therefor alleges that the statements and evidence were obtained through fraud, deceit and trickery on the part of the government's agents and in violation of defendant's fifth and sixth amendment rights under the United States Constitution. Defendant does not contend that Miranda v. Arizona, 384 U. S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), or Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), require the suppression of the evidence. See Agoranos v. United States, 409 F.2d 833 (5th Cir. 1969); United States v. Jernigan, 411 F.2d 471 (5th Cir. 1969).

A civil tax audit was conducted by Revenue Agent Clausson P. Lexow until August 14, 1963, when the case was referred to Special Agent Edward M. Cohen for a full criminal

investigation. Revenue Agent Lewis E. Stanley made an appointment with defendant for October 1, 1963. Stanley and Special Agent Cohen met with defendant and identified themselves as Revenue Agent and Special Agent, respectively. They did not advise defendant of the significance of the distinction of their titles, specifically, that a Special Agent is a criminal investigator, or that the investigation had assumed a criminal character, or that it was to determine the existence of fraud. They did not give defendant *Miranda*-type warnings. Defendant testified that he did not understand the nature of a "special agent."

It is not necessary to decide whether failure to explain the distinction between "revenue" and "special" agent and failure to inform defendant that the investigation had become criminal in themselves constitute fraud, deceit and trickery, as the Court is of the opinion that, considering all the circumstances surrounding the transformation of the investigation into a criminal one, the evidence obtained from defendant after August 14, 1963, was obtained by fraud, deceit and trickery.

The investigation began as a civil audit by Revenue Agent Lexow of the tax returns of Florida Corporation of America and its subsidiaries. During the course of the audit, Lexow discovered what he considered to be evidence of fraud and on July 3, 1963, started to write a referral report to the Intelligence Division of the Internal Revenue Service recommending a criminal investigation of defendant. During the process of referring the case, and with knowledge that the case was being referred to the Intelligence Division, Lexow wrote defendant requesting certain documents and assuring him that by producing the documents "you will be saved a considerable amount of time * * *." (Defendant's Exhibit No. 2).

After the criminal investigation began, Lexow again wrote to defendant on August 29, 1963, requesting copies of certain documents which had been supplied to Lexow on his last visit but which he had left behind by inadvertence. Lexow advised defendant that he (Lexow) was being transferred to Ocala, Florida, and further advised him as follows:

> Your return along with the others under examination are being transferred to Agent Lewis E. Stanley of this office. Please address all future correspondence to him. You have been most cooperative in this examination to date. I trust you will extend the same courtesy to Agent Stanley. (Defendant's Exhibit No. 3)

Subsequent to the mailing of this letter, the aforementioned meeting of defendant and Revenue Agent Stanley and Special Agent Cohen took place on October 1, 1963. Over the following fifteen months the agents conducted a complete criminal investigation with the cooperation of defendant, who was unaware that the new nature of the investigation gave him a right to refuse to produce evidence against himself.

On the facts presented to the Court, it is clear that the Internal Revenue Service agents engaged in a deliberate scheme to deceive defendant in order to prevent his suspecting that the nature of the investigation had altered materially. Revenue Agent Lexow established a friendly rapport with defendant and indicated that he would assist defendant in reporting a certain large item on a future return. After the referral of defendant's case, Agent Lexow maintained the cordial tone of his correspondence, complimenting defendant on his cooperation. (See Defendant's Exhibit No. 3) His reference to the transfer of the case to Revenue Agent Stanley was calculated to raise no suspicion, and the fact that Special Agent Cohen would be in charge of the Intelligence Division investigation was omitted.

It appears, therefore, that the evidence obtained during the criminal investigation must be suppressed. Goodman v. United States, 285 F.Supp. 245 (C.D.Cal.1968). In addition, any evidence obtained as a result of information given by defendant solely during the criminal investigation must also be suppressed. The exclusion of statements or documents obtained from defendant solely during the criminal investigation, however, in no way bars the introduction of statements or documents which defendant volunteered prior to the initiation of the criminal investigation or information developed therefrom such as that obtained by Agent Lexow's letter of August 29, 1963. Nor does it bar evidence obtained from sources independent of interviews with defendant.

It is, therefore:

Ordered:

1. Defendant's Motion to Suppress is granted, and all evidence obtained from defendant on or after August 14, 1963, is suppressed.

2. Copies of documents requested by Agent Lexow in his letter of August 29, 1963, which had been supplied to him before the criminal investigation began, will not be suppressed.

App. 5

UNITED STATES of America,
Plaintiff-Appellant,

v.

Horton R. PRUDDEN,
Defendant-Appellee.

No. 28140.

United States Court of Appeals,
Fifth Circuit.

April 10, 1970

424 F.2d 1021

Before JOHN R. BROWN, Chief Judge, and COLEMAN and CLARK, Circuit Judges.

CLARK, Circuit Judge:

Horton R. Prudden was indicted on seventeen counts of evading taxes due the United States. On taxpayer's motion made prior to trial, the court below in a blanket order suppressed all statements made and all corporate and personal documents furnished by Prudden to a special agent of the Internal Revenue Service, together with all evidence obtained through or as a result of such statements or documentary evidence. Suppression was based on a finding that the Internal Revenue Service had obtained such statements and documents by engaging in a deliberate scheme to deceive Prudden in order to prevent his understanding that an investigation originally commenced by a revenue agent had materially altered at the time the special agent entered the case.[1] The United States chose to appeal the suppression order rather than to proceed to trial without the evidence

1. 305 F.Supp. 110 (M.D.Fla.1969).

thus suppressed. Since the record does not clearly and convincingly demonstrate a deliberate scheme to deceive and we reject the taxpayer's contention that he was entitled to *Miranda* warnings, we reverse.

The following facts are either undisputed or are stated most favorably to the taxpayer. On May 10, 1963, certain returns of The Florida Corporation of America (FCA) and its subsidiaries were assigned to Revenue Agent Lexow for the purpose of determining the correctness of the tax reported. At this time Lexow had been with the Internal Revenue Service about one year—he was still in training and was not a full-grade agent. Prudden was 50 years of age, a law school graduate and then employed as a security analyst for a member firm of the New York Stock Exchange. After learning that FCA was to be examined, Prudden telephoned Lexow at the Palm Beach office of the Internal Revenue Service from his home in Connecticut, stating that he was a director of FCA. He inquired if Lexow's examination was to cover FCA alone or its subsidiaries also and further asked if the examination was routine. Lexow replied that the examination would cover both FCA and its subsidiaries and that it was not routine; that the returns had been selected in Jacksonville to be examined and had been assigned to Lexow from there.

The examination actually commenced on May 31 when Lexow contacted Mrs. Anne G. Smith, who was indicated on the returns to be the president of these corporations.[2] All

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2. Prudden testified that Mrs. Smith had merely been a statistician and at the time of these examinations she was not a corporate officer but was acting as an independent agent on an hourly pay basis. The ownership of substantially all the FCA stock was held in trusts, of which Prudden was co-trustee for his sons.

of Lexow's subsequent examinations were made under the supervision of Mrs. Smith either with or without Prudden present. Prudden and Mrs. Smith were cooperative with Agent Lexow, furnishing him most of the documents he wished to examine and making copies for him at his request. By June 17 Lexow's examinations had disclosed what he considered to be possible indications of fraud. It appeared to Lexow that a Nassau based corporation, Research and Development, Ltd., might be skimming profits off one of FCA's subsidiaries. He further noted there was no indication as required on the return, that the Bahamian and American corporations were related. Lexow had also discovered information concerning a sale of stock which gave the appearance of having produced a large capital gain, but had been reported as a loss. By this time Lexow's investigation had also broadened to cover Prudden's personal returns. Lexow made no report of these suspicions to his superiors at this juncture because he wanted to pursue the examination further.

A number of times during Lexow's audit Prudden told him that if they found anything wrong, he, Prudden, wished that Lexow would let him know so that it could be corrected and any tax due could be paid. Prudden was particularly insistent that Lexow advise him on how to handle several details of a particular stock sale. Lexow testified that it was possible that he did tell Prudden that when all the facts were known to him he would advise Prudden how a 52,000 dollar escrow item connected with the stock sale should be handled, but Prudden admits he never got this advice.

When a revenue agent discovers indicia of fraud in the course of an examination, the routine procedure requires that he refer a complete report of his findings to the Intelligence Division of the revenue service, which then determines whether it will assign a special agent to take charge of the

case. On June 27, while Lexow's examination was continuing, he had his first discussions with other persons in his office about the possibility of referring the case to the Intelligence Division. Lexow began to write his referral report on July 3 and completed it on July 15. On July 9 he wrote Prudden requesting bank statements and canceled checks of Research and Development, Ltd., urging him to forward these documents to Lexow in order to save time and enable Lexow to proceed with his examination of FCA and its subsidiaries. He also complimented Prudden on his cooperation. A copy of this letter is set out in the margin.[3] It was not shown that Prudden ever furnished the documents requested to Lexow or his successors.

Lexow did not meet with Prudden or Mrs. Smith after July 9. On August 14, Lexow received advice from the Intelligence Division that it had decided to make a full-scale investigation. On August 29, after a telephone conversation with Mrs. Smith indicated that Prudden wanted a written request, Lexow wrote Prudden requesting that copies be made available to him of papers previously furnished but inadvertently

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3. "Dear Mr. Prudden:

I presume that you have retrieved from storage the bank statements and canceled checks of Research and Development, Ltd.'s two bank accounts.

Please forward them to me in care of this office. By doing so, we will both benefit in that you will be saved a considerable amount of time upon your return to Florida and prior to your return, I will be able to proceed with my examination of F C A and subsidiaries.

You have been most cooperative in furnishing information and in giving of your time in connection with this examination; therefore, I feel sure that you will give your immediate attention to this matter.

Sincerely,"

left in the corporation's office. He also asked for a schedule which computed losses incurred from acts of an unfaithful employee. In this letter Lexow advised Prudden that he was being transferred at his own request, to an assignment that would permit him to return to college, and that Agent Lewis E. Stanley was to become the agent on the case. Lexow's letter requested Prudden to continue to cooperate with Agent Stanley. A copy of this letter is set out in the margin.[4] On the date of this letter Lexow knew that Special Agent Edward M. Cohen was then in charge of the Prudden investi-

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4. "Dear Mr. Prudden:

Before you left on the 9th of August you made copies of some papers for me which I left in your office by mistake. I would appreciate it if you would have your secretary, Mrs. Smith, make them available to me. It is necessary that I have them to properly verify your returns. The copies were of the following three items: 1) a note from H. B. Bradford, CPA advising you on the proper way to handle costs relative to the sale of 1st S. E. stock which were incurred after the sale; 2) a list of 1st S. E. subsidiaries with addresses and locations; and 3) your letter to Kent, re: $52,800.00 escrowed money (it is not absolutely necessary that I have this).

A fourth item which I need but failed to ask for during your last visit is a copy of the schedule you recently prepared showing a computation of the Palmer Fidelity loss.

At my request the Government is moving me to our Ocala, Florida office, in order that my wife and I can take advantage of the educational facilities at the University of Florida. Your return along with the others under examination are being transferred to Agent Lewis E. Stanley of this office. Please address all future correspondence to him.

You have been most cooperative in this examination to date. I trust that you will extend the same courtesy to Agent Stanley.

Sincerely,"

gation, but his name was not mentioned to Prudden or Mrs. Smith.[5]

In several instances, Prudden refused to give Lexow requested documents which Prudden felt were outside the proper scope of Lexow's examination. Lexow once told Prudden that the Internal Revenue Service would never leave him alone until he produced some records for Research and Development, Ltd. Prudden took the position that such records did not have to be produced and, as stated, he never produced them. On one occasion when Lexow raised a question as to constructive ownership with Prudden, Prudden told Lexow not to attempt to tell him about the rules of constructive ownership, that that subject had been his specialty in law school and he had studied it for three years. On several occasions Prudden told Lexow that he, Lexow was simply on a fishing expedition—trying only to gather facts that would support Lexow's preconceived conclusions. In his final letter to Lexow, Prudden stated that he was left with the impression that items were being singled out of context in order to attack his intentions as unfair and not forthright. He pointed out that he had frequently asked for the Internal Revenue Service's views but had never received a stable answer of any kind. He further offered to review with Agent Stanley "whatever context he may wish to go over," expressly including the summary of losses sustained due to activities of the unfaithful employee, which Lexow had previously requested.

On September 13, 1963, Revenue Agent Lewis E. Stanley wrote Prudden confirming a meeting on October 1, 1963 in

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5. Lexow testified that the information was sought to make his final report on the matter complete and that he did not withhold the disclosure of Cohen's assignment because of any fear such disclosure would cut off the flow of information.

Palm Beach. Although the letter did not mention him, Special Agent Cohen intended to and did meet with Prudden and Stanley. When Cohen and Stanley opened the meeting they identified themselves to Prudden as a special agent and a revenue agent respectively, and showed him their written credentials, which he examined. Cohen's credentials plainly carried the legend "Intelligence Division". Prudden testified that he did not know the significance of Cohen's designation as a special agent. They informed Prudden that they were there to make an audit and examination of his returns, the returns of his three sons and the returns of FCA and its eight subsidiaries. He was also told that the examination would include any other corporation or gift tax returns that he had filed. Neither Stanley nor Cohen ever stated to Prudden that a criminal investigation was being conducted or that the investigation they were making was being made to determine the possibility of fraud. Prudden was never given any warning nor was he ever advised that he had a right to remain silent or that any information furnished by him could be used against him in any subsequent proceedings. All actions and procedures followed by Stanley and Cohen were in accord with what was then the Internal Revenue Service's standard procedure in such cases.

On December 21, 1964, Revenue Agent Stanley and Special Agent Cohen interviewed Prudden at the Internal Revenue Service Intelligence Division office. Prudden answered the questions asked him but refused to allow the conversation to be recorded. All other meetings between Prudden and the IRS agents were at Prudden's office at his convenience during regular business hours. The work of Special Agent Cohen and Agent Stanley extended over a period of some fifteen months. Prudden persisted in refusing records of the Bahamian corporation and records outside the years he felt were properly

open. He continued to complain that the agents were fishing and criticized third-party investigations, but he also continued to cooperate within these limits with the agents' requests for information and records during the entire period.

I. NECESSARY WARNINGS AND ADVICE

Prudden contends that the evidence obtained after Special Agent Cohen entered the investigation must be suppressed because he, Prudden, was not warned and advised of his rights according to Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).[6] We adhere to our prior rulings and reject this contention. However, the Supreme Court's ruling in Mathis v. United States, 391 U.S. 1, 88 S.Ct. 1503, 20 L.Ed.2d 381 (1968) reversing this court and holding that routine tax investigations are not immune from the *Miranda* requirements for warnings to be given to a person in custody, and two recent decisions from the Seventh Circuit which reach

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6. Although the evidence in question was obtained prior to the decision in *Miranda*, the Supreme Court applied that decision to persons whose trials had not begun as of June 13, 1966, regardless of when the alleged constitutional infirmity occurred. Johnson v. New Jersey, 384 U.S. 719, 734, 86 S.Ct. 1772, 1781, 16 L.Ed.2d 882 (1966). In Jenkins v. Delaware, 395 U.S. 213, 89 S.Ct. 1677, 23 L.Ed.2d 253 (1969), the Court limited the retroactivity of the rule by refusing to apply it to retrials commenced after the date of the decision even though the original trial preceded *Miranda*. It is appropriate to here note that the District Court was under the impression that Prudden did not rely on *Miranda* and the order suppressing evidence was expressly declared to be independent of any application of *Miranda* to the instant case. The constitutional dimensions of that rule and the fact that this cause must be remanded for further proceedings where the point might be raised, indicate that we should rule on it now.

a result contrary to ours here,[7] indicate that we make a detailed review of this issue.

A recurrence to the constitutional foundation is always an appropriate beginning point. The Fifth Amendment's mandate is that no person shall be "compelled in any criminal case to be a witness against himself, * * *."

Compulsion, a requisite to the invocation of the Amendment's protection against self-incrimination, was not attenuated in *Miranda*. The majority opinion in *Miranda* is complex and lengthy but the following pertinent extracts highlight the problem presented and explain the controlling principles. In the preface the court epitomized the decision's meaning thusly:

> "Our holding will be spelled out with some specificity in the pages which follow but briefly stated it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."
>
> (384 U.S. at 444, 86 S.Ct. at 1612)

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7. United States v. Dickerson, 413 F.2d 1111 (7th Cir. 1969), and United States v. Habig, 413 F.2d 1108 (7th Cir. 1969), cert. den., 396 U.S. 1014, 90 S.Ct. 559, 24 L.Ed.2d 506 (1970). (The *Miranda* issue was not presented to the Court in the Application for Writ of Certiorari.). See also United States v. Campione, 416 F.2d 486 (7th Cir. 1969).

Part I began with the following paragraph:

> "The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way. In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions, and in three of them, signed statements as well which were admitted at their trials. They all thus share salient features—incommunicado interrogation of individuals in a police-designated atmosphere, resulting in self-incriminating statements without fair warnings of constitutional rights."
>
> (384 U.S. at 445, 86 S.Ct. at 1612)

The Court continued by pointing out that sophisticated psychological techniques had been developed by police to supplant the oft condemned use of physical force to extort confessions, the key to which called for isolating suspects from familiar surroundings and friends. It distilled the new techniques this way:

> "From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: To be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist."
>
> (384 U.S. at 455, 86 S.Ct. at 1617)

and concluded thusly:

> "In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent, * * *. It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation."
>
> (384 U.S. at 457, 86 S.Ct. at 1618)

Part II traced the history of the privilege, its embodiment in our Constitution and its subsequent court implementations down through Escobedo v. Illinois, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964), with this application of the latter's rationale:

> "The entire thrust of police interrogation there, as in all the cases today, was to put the defendant in such an emotional state as to impair his capacity for rational judgment. The abdication of the constitutional privilege—the choice on his part to speak to the police—was not made knowingly or competently because of the failure to apprise him of his rights; the compelling atmosphere of the in-custody interrogation, and not an independent decision on his part, caused the defendant to speak."
>
> (384 U.S. at 465, 86 S.Ct. at 1623)

Part III demonstrated how the rule announced was to be employed and detailed the justification for tendering an attorney's advice. It closed with this caveat:

> "Our decision is not intended to hamper the traditional function of police officers in investigating crime.

See Escobedo v. State of Illinois, 378 U.S. 478, 492, 84 S.Ct. 1758, 1765. When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present.[46]

46. "The distinction and its significance has been aptly described in the opinion of a Scottish court:

'In former times such questioning, if undertaken, would be conducted by police officers visiting the house or place of business of the suspect and there questioning him, probably in the presence of a relation or friend. However convenient the modern practice may be, it must normally create a situation very unfavourable to the suspect.' Chalmers v. H. M. Advocate [1954] Sess.Cas. 66, 78 (J.C.)."

"In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a per-

son who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today."

(384 U.S. at 477, 478, 86 S.Ct. at 1629-1630)

In Mathis v. United States, supra, the taxpayer was convicted of tax fraud on the basis of evidence elicited by a regular revenue agent on a routine investigation made while the taxpayer was in prison for an unrelated crime. The Supreme Court reversed our affirmance of the conviction[8] because the prisoner had not been given the *Miranda* warnings. Although *Mathis* makes it clear that *Miranda* is potentially applicable to any tax investigation, it most definitely does not require *Miranda* warnings in all tax investigations. *Mathis* in no way diminishes the necessity for showing actual or inherent compulsion to self-incrimination. Mathis was not merely at the station house, he was imprisoned for a fixed term. He was deprived of his liberty in a most positive way. Thus when the court established that the type of inquiry there present was not determinative, the result was necessarily a finding of Fifth Amendment violation.

In our view, the Seventh Circuit's recent opinion in United States v. Dickerson, supra, which petitioner urges we now adopt, is an unwarranted extension of the *Miranda* decision. *Dickerson* held that *Miranda* warnings must be given a taxpayer at the inception of first contact with him following the

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8. We held that routine tax investigations were not criminal in nature, and thus were beyond the protection of the Fifth Amendment without regard to the presence or absence of compulsion. Mathis v. United States, 376 F.2d 595 (5th Cir. 1967).

transfer of a tax case to the Intelligence Division. The facts recited in that opinion show no element of custody or restraint – no deprivation of freedom – no compelling atmosphere – only a visit by a regular and a special agent of the Internal Revenue Service to defendant at his place of business. The opinion stated:

> "We understand the teaching of *Miranda* to be that one confronted with governmental authority in an adversary situation should be accorded the opportunity to make an intelligent decision as to the assertion or relinquishment of those constitutional rights designed to protect him under precisely such circumstances." 413 F.2d at 1114.

Thus, the court inferred compulsion from the fact that the investigators represented "governmental authority in an adversary situation." Such a rule is overbroad and we expressly decline to follow it.

We cannot agree that every administrative official who confronts a citizen with a request for information that might disclose criminal conduct, thereby exerts a compulsion on the citizen that must be dispelled by the *Miranda* placebo. In today's vast and complex network of widespread daily administrative contacts between citizens and government officials, such a holding would open a veritable Pandora's box. When a census taker returns to recheck information he has received or a building inspector comes to investigate a report of noncompliance with provisions of the city housing code or a game warden who hears shooting out-of-season stops a man he finds in the woods or a bank examiner questions a teller whose figures are out of balance, would each of them have to give the *Miranda* warnings? In each case a governmental official is confronting a citizen and criminal charges

may result. There are a thousand and one administrative inquiries routinely made every day in every city which could evoke responses that might form a part of the basis in proof for a charge of perjury, falsification of records, failure to file a report or perform a legal duty or other ciminal conduct. Most of these routine administrative confrontations would be rendered ineffective to the citizen and his government by imposing *Miranda* requirements. Indeed, if the warning became too commonplace, the very purpose of its requirement could be undermined. If "authority" were allowed to supplant custody—the deprivation of freedom—as the determinant of compulsion, even these routine field investigations which *Miranda* expressly exempted must fall. Under such a rule a policeman upon stopping a motorist could not ask to see his license without warning him and advising him in full.[9] It is not for this Court to so extend *Miranda*, and we are particularly unwilling to extend it to an adult experienced businessman, a law school graduate, who for over a year voluntarily furnished selected corporate and personal records to tax agents—not claimed to be overbearing but over kind.[10]

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9. Cf. United States v. Marlow, 423 F.2d 1064 (5th Cir. 1970), where a routine request for a driver's license made without *Miranda* warnings produced a wrongfully acquired credit card that led to the driver's conviction for obstructing the mails.

10. There are other incongruities in *Dickerson*. It purports to apply *Mathis* but admittedly does not use *Mathis*' standard. In *Mathis* a routine examination by a regular revenue agent prior to any reference of the case to the Intelligence Division of the Revenue Service, was voided. *Dickerson* does not apply this rule, it admits incriminations by the taxpayer produced by the regular agent and only suppresses information obtained after the case had been transferred to the Intelligence Division. Since *Mathis* did not recognize any dis-

The record shows that Prudden's interviews with all the agents were on generally amicable terms—what Prudden described as "a normal business arrangement." He limited the information he gave the agents, specifically refusing to give them requested information from years not under examination and the records of the Bahamian subsidiary. He testified that he was never threatened. He even testified that Lexow once told him that the Internal Revenue Service would not leave him alone unless he produced the Bahamian company records, yet he never produced them. There was simply no factual support for a contention that Prudden was put in such an emotional state as to impair his capacity for rational judgment.

Moreover, there is no evidence that the incriminating evidence was coerced as a matter of law; i.e., was the result of in-custody interrogation or anything approaching compar-

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tinction between the regular and special agent, the compulsive effect of the agent's official status is identical. Unless the regulations of the Internal Revenue Service are changed or United States v. Heffner, infra n. 12, is not followed, *Dickerson* will have no effect as precedent. Prior to its rendition, the Revenue Service adopted a regulation requiring special agents to give *Miranda* type warnings on their first contact with taxpayers. In recognition of the fact that *Dickerson* represented a departure from the present state of the law, the court determined that its holding would only apply to interrogations taking place after the date of the decision. Thus only *Dickerson* and the taxpayer in the companion case of *Habig* will be affected. If Prudden's case were now presented to that circuit he would get no benefit from that ruling since the investigations here involved took place in 1963 and 1964.

able pressures.[11] None of the evidence that Prudden seeks to suppress was obtained while he was under arrest or under any sort of actual or implied restraint. In fact, Prudden's fraud, deceit and trickery contentions strongly militate against any thought of pressure. The basic thrust of this other contention is that the agents were too nice to him. He was never deprived of his freedom in any significant way during the questioned interviews, all but one of which took place at his own office at his convenience during regular office hours.[12] The

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11. The Supreme Court in *Miranda*, defined custodial interrogation to mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom in any significant way. The Court also emphasized that the "salient features" of the cases there decided showed "incommunicado interrogation of individuals in a police-dominated atmosphere." 348 U.S. at 445, 86 S.Ct. at 1612.

12. We recognize that custodial interrogation can occur beyond the confines of the station house. For example, in Orozco v. Texas, 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed.2d 311 (1969), the Court applied *Miranda* to incriminating evidence obtained by questioning the suspect in his own room in a boarding house. The suspect was alone and in the custody of four police officers who questioned him. Under those circumstances, Orozco was held to be significantly deprived of his freedom. But *Orozco* merely stands for the rule that "a compelling atmosphere" can exist outside of the station house, it does not hold that any inquiry by a government official carries such an element of intimidation as amounts to compulsion to self-incrimination. The majority opinion emphatically states: "We do not, as the dissent implies, expand or extend to the slightest extent our *Miranda* decision." See also United States v. Lackey, 413 F.2d 655 (7th Cir. 1969), where a recorded courthouse basement interrogation of the taxpayer alone was held to be within *Miranda's* ambit. No comparable significant deprivation of freedom or compelling atmosphere ever existed in the case now before us.

one interview which occured in the Internal Revenue Service office is of no consequence. He came to the office voluntarily and was not restrained from leaving whenever he chose. The courts have uniformly held that such office interviews are neither custodial nor do they impose any significant restraints of freedom.[13]

In applying *Miranda's* rule, this Circuit has taken a case-by-case approach on the theory that "to foster proper development of controlling precedent * * * each case must be examined to determine whether there were present the compulsive factors with which *Miranda* was concerned." United States v. Montos, 421 F.2d 215, 223 (5th Cir. 1970). All of our case-by-case holdings have uniformly applied one concept—that *Miranda* warnings are not constitutionally required in tax investigation cases where the taxpayer is not deprived of his freedom and is not actually compelled or coerced to furnish statements or documents. Such holdings and our ruling here are also consistent with other circuits.[14] Our most

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13. *See e. g.*, Ping v. United States, 407 F.2d 157 (8th Cir.), cert. den., 395 U.S. 926, 89 S.Ct. 1784, 23 L.Ed.2d 244 (1969); Spinney v. United States, 385 F.2d 908 (1st Cir.), cert. den., 390 U.S. 921, 88 S. Ct. 854, 19 L.Ed.2d 981 (1967); Schlinsky v. United States, 379 F.2d 735 (1st Cir.), cert. den., 389 U.S. 920, 88 S.Ct. 236, 19 L.Ed.2d 265 (1967).

14. An exhaustive collection of such authorities is set out in United States v. Squeri, 398 F.2d 785, 789-790 (2d Cir. 1968). See also United States v. White, 417 F.2d 89, 91 (2d Cir. 1969), cert. den. 397 U.S. 912, 90 S.Ct. 910, 25 L.Ed.2d 92 (1970) in which the Second Circuit explicitly refused to follow Dickerson, and the cases there cited, and Spahr v. United States, 409 F.2d 1303 (9th Cir.), cert. den. 396 U.S. 840, 90 S.Ct. 102, 24 L.Ed.2d 91 (1969). The only contrary authorities are the decisions of the Seventh Circuit in United States v. Dickerson and United States v. Habig, supra, and the District

recent decisions have maintained a similar consistency of approach. In Agoranos v. United States, 409 F.2d 833 (5th Cir., cert. den., 396 U.S. 824, 90 S.Ct. 67, 24 L.Ed.2d 75 (1969) the taxpayer sought reversal of a tax fraud conviction because he had not been given *Miranda* warnings. We refused to reverse because at the time the taxpayer was questioned by the special agent he "was not in custody and the *Miranda* doctrine applies only to in-custody interrogation."[15] Prudden seeks to distinguish *Agoranos* because the special agent did not know at the time of the questioning that the taxpayer was being investigated, but such an attempted distinction misses the true thrust of that holding—the taxpayer

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Court rulings noted in Dickerson, 413 F.2d at 1114, n. 6. See also United States v. Casias, 306 F.Supp. 166 (D.Colo.1969). Though not as circumscribed as *Dickerson*, our holding here may have limited effect as precedent for the same reason mentioned in note 8, supra. Since May of 1967 the Internal Revenue Service has required Special Agents to give the taxpayer all essential *Miranda* warnings and advice at their initial conference. See I.R.S. News Release IR-949 (1969 CCH Fed. Tax Rptr. ¶6946). The Fourth Circuit has recently held that in tax investigations occuring after the inception of this policy the IRS is required to comply with its own rule on the basis of United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 74 S.Ct. 499, 98 L.Ed. 681 (1954). United States v. Heffner, 420 F.2d 809 (4th Cir. 1969). Since this question is not presented by this appeal, we refrain from expressing any direct opinion on it. It is appropriate, however, that we now note that our holding here accords no retroactive significance to the promulgation of this administrative policy. That the Internal Revenue Service has voluntarily taken upon itself to now give a taxpayer *Miranda* type warnings and advice at the Special Agent's first meeting with him, does not give taxpayers questioned before the promulgation of this order additional constitutional rights.

15. 409 F.2d at 835.

was not in custody or under compulsion when the interview took place. In United States v. Jernigan, 411 F.2d 471 (5th Cir.), cert. den., 396 U.S. 927, 90 S.Ct. 262, 24 L.Ed.2d 225 (1969) we again refused to require *Miranda* warnings. Prudden's attempt to distinguish this case because the agent was a regular and not a special agent not only conflicts with *Mathis* but is not apropos to the point he makes. Regular agents frequently obtain evidence which later forms one or more links in the chain which affixes criminality to the acts of a tax evader.

Marcus v. United States, 422 F.2d 752 (5th Cir. 1970) is our latest decision which discusses this question. Marcus was convicted for failing to file individual tax returns. One ground of his appeal was that he had not been given *Miranda* warnings nor expressly told of the criminal nature of the investigation by special agents of the Internal Revenue Service until after he had supplied records and made damaging admissions.[16] Marcus contended, as Prudden now does, that

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16. The facts in *Marcus*, which was decided after the instant appeal was argued, do differ from the case sub judice: In the words of that opinion:

> "There is testimony in the record * * * that at the first interview the Internal Revenue agents informed Marcus that they were Special Agents attached to the Intelligence Division, which handles only criminal investigations, that he had a right to remain silent, and that anything he said could be used against him. Likewise, it is undisputed that the agents failed to inform Marcus that he had a right to an attorney, as they were required to do if Marcus was entitled to a *Miranda* warning." 422 F.2d at 756.

These factual differences do not serve to distinguish *Marcus*. The rights protected by *Miranda* are constitutional in nature and if *Miranda* warnings and advices are required at all, they are all required for unconstitutionality knows no gradations.

Miranda applied to noncustodial tax fraud investigations. We rejected this contention with the statement: "In a criminal tax fraud case, this Court has recently held that the *Miranda* doctrine applies only to in-custody interrogation. Agoranos v. United States, 5 Cir., 1969, 409 F.2d 833. Since [the taxpayer] was at no time in custody during the Internal Revenue Service investigation, the contention is without merit."[17]

Two recent cases before this court, United States v. Roundtree, 420 F.2d 845 (5th Cir. 1969) and Stuart v. United States, 416 F.2d 459 (5th Cir. 1969), concerned a related but distinguishable question. Those taxpayers claimed that enforcement of an Internal Revenue Service administrative summons would compel them to incriminate themselves. In those cases we recognized that a routine tax investigation may be criminal in nature. In *Roundtree* we stated that if the taxpayer can show that the proceeding had become an inquiry with dominant criminal overtones, he would be entitled to raise Fifth Amendment objections. Compulsion was present in *Roundtree* and *Stuart* in the form of the subpoena and the single remaining element necessary to invoke the Fifth Amendment's protection was the claim of self-incrimination. Even if Prudden could show that the inquiry into the tax liability of the corporation, himself and his family was one with dominant criminal overtones, he would fail to bring himself within Miranda's ambit because he cannot show compulsion.

II. THE CLAIM OF FRAUD, DECEIT AND TRICKERY

The trial judge suppressed all evidence obtained on or after the day when Lexow referred the case to the Intelligence Division because he found that the Internal Revenue Service

17. 422 F.2d at 756.

agents engaged in a deliberate scheme to deceive Prudden in order to prevent his suspecting that the nature of the investigation had altered materially.[18] Here the ultimate fact determination was reached by a process of reasoning from undisputed evidentiary facts. After a careful review of the entire record, we conclude that ultimate fact finding—fraud, deceit and trickery by the agents—is a mistaken one.[19] We are left with the definite and firm conviction that this finding is in error.[20]

Because of the holding we make here it is unnecessary to discuss the breadth of the suppression order, reaching as it did not just personal records but corporate records in corporations with which Prudden was connected only as a director or an employee. No claim of privilege as to self-incrimination relative to this type of third party records has previously been recognized. *See, e.g.*, Hale v. Henkel, 201 U.S. 43, 26 S.Ct. 370, 50 L.Ed. 652 (1906); Fineberg v. United States, 393 F.2d 417 (9th Cir. 1968); Hensley v. United States, 406 F.2d 481 (10th Cir. 1968).

If the evidence obtained subsequent to Special Agent Cohen's entry into the investigation were the result of an unreasonable search in violation of the Fourth Amendment, then it would have to be suppressed. Prudden also asserts vio-

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18. 305 F.Supp. at 111.

19. Galena Oaks Corporation v. Scofield, 218 F.2d 217 (5th Cir. 1954); Mayo v. Pioneer Bank & Trust Co., 297 F.2d 392 (5th Cir. 1961).

20. United States v. United States Gypsum Co., 333 U.S. 364, 394-395, 68 S.Ct. 525, 541-542, 92 L.Ed. 746 (1948); United States v. Singer Mfg. Co., 374 U.S. 174, 194 n. 9, 83 S.Ct. 1773, 1784 n. 9, 10 L.Ed.2d 823 (1963); Minneapolis-Moline, Inc. v. Bryan, 415 F.2d 841 (5th Cir. 1969).

lation of Fifth and Sixth Amendment rights. Since all claimed violations depend upon a showing of the existence of fraud, deceit or trickery, it is not necessary to discuss each constitutional claim separately. Prudden postulates that the search was unreasonable because his consent to examine the records was obtained by fraud, deceit and trickery. While we recognize that fraud, deceit or trickery in obtaining access to incriminating evidence can make an otherwise lawful search unreasonable,[21] Prudden, as the moving party in the motion to suppress, did not sustain the burden that was his of demonstrating that fraud, deceit or trickery were present.[22]

The essence of Prudden's contention and the finding of the trial court is that the circumstances surrounding the transformation of the investigation into one with increased possibilities of resultant criminal charges without Prudden's knowledge, required suppression of the evidence.[23] Just how Prudden was defrauded, deceived or tricked is what we fail to perceive. Certainly, if the agents had given Prudden the full panoply of *Miranda* warnings, and advice, he could not make

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21. Gouled v. United States, 255 U.S. 298, 41 S.Ct. 261, 65 L.Ed. 647 (1921); Spahr v. United States, 409 F.2d 1303 (9th Cir. 1969), cert. den., 396 U.S. 840, 90 S.Ct. 102, 24 L.Ed.2d 91 (1969); United States v. Sclafani, 265 F.2d 408 (2d Cir.), cert. den., 360 U.S. 918, 79 S.Ct. 1436, 3 L.Ed. 2d 1534 (1959). We explicitly reject the government's contention that the agents were free to use fraud, deceit or trickery. In cases where the IRS agents are obtaining consent to examine documents, they cannot gain such consent by affirmatively misrepresenting the nature of the search.

22. Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed.2d 307 (1939); Der Garabedian v. United States, 372 F.2d 697 (5th Cir. 1967).

23. 305 F.Supp. at 111.

such a claim. *Miranda* warnings, however, were not required. So what were the agents required to do or leave undone or say or let go unsaid that discloses the fraud, deceit and trickery? They told him they wanted to audit and examine records in his possession relating to tax returns. They pursued this announced intention in what Prudden describes as a businesslike way at intervals over many months, despite his occasional expressions of discontent. We are unable to say that they had a duty to do more or less under the circumstances disclosed by this record.

Prudden points to the failure of Special Agent Cohen to tell him that his function was to investigate for criminal fraud. All Cohen was required to do by the then existing Internal Revenue Service requirements was to tell Prudden that he was a Special Agent and show Prudden his credentials. This he did. He in no way concealed his true identity. He could not have affirmatively mislead Prudden as to the function of the Intelligence Division or as to the duties of a special agent, since neither of these subjects were ever discussed. Silence can only be equated with fraud where there is a legal or moral duty to speak or where an inquiry left unanswered would be intentionally misleading.[24] None of these factors were present here.

In Spahr v. United States, supra note 21, one ground of taxpayer's appeal of his conviction for corporate tax evasion was

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24. *See* United States v. Sclafani, 265 F.2d 408 (2d Cir.), cert. den., 360 U.S. 918, 79 S.Ct. 1436, 3 L.Ed.2d 1534 (1959); *c. f.*, Avery v. Cleary, 132 U.S. 604, 10 S.Ct. 220, 33 L.Ed. 469 (1890); Atkins v. United States, 406 F.2d 694, 698 (5th Cir. 1969); American Nat'l Ins. Co., etc. v. Murray, 383 F.2d 81 (5th Cir. 1967).

that incriminating evidence was procured through guile and fraud. Allegedly the revenue agents fraudulently concealed the true purpose of their investigation. As in the instant case, two agents merely identified themselves as a special agent and a revenue agent, respectively, without giving any additional warnings. The Ninth Circuit found no deception. Quoting the Second Circuit's opinion in United States v. Sclafani, supra note 21, they said:[25]

> "A 'routine' tax investigation openly commenced as such is devoid of stealth or deceit because the ordinary taxpayer surely knows that there is inherent in it a warning that the government's agents will pursue evidence of misreporting without regard to the shadowy line between avoidance and evasion, mistake and willful omission."

In *Sclafani*, as in the instant case, the taxpayer objected that records obtained from him after the "routine audit" commenced by a revenue agent was turned over to a special agent should have been suppressed because they were obtaind through stealth and deceit. The court found no fraud or deceit and stated:[26]

> "The Fourth Amendment does not require more than this, that when his consent is sought the taxpayer be apprised of the government's concern with the accuracy of his reports, and therefore of such hazards as

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25. 409 F.2d at 1306, *quoting*, 265 F.2d at 414-415.

26. 265 F.2d at 415. *See* United States v. Squeri, 398 F.2d 785, 788 (2d Cir. 1968):
"[T]he information that a taxpayer's returns are under audit gives notice of the possibility of criminal prosecution regardless of whether the agents contemplate civil or criminal action when they speak to him."

> may be incident to a voluntary disclosure. We hold that Sclafani was so apprised by the warning inherent in the request when Agent Sonkin identified himself and disclosed his purpose to audit certain returns of the corporation."

We conclude that the mere failure of a revenue agent (be he regular or special) to warn the taxpayer that the investigation may result in criminal charges, absent any acts by the agent which materially misrepresent the nature of the inquiry, do not constitute fraud, deceit and trickery. Therefore, the record here must disclose some affirmative misrepresentation to establish the existence of fraud, and this showing must be clear and convincing.[27]

Prudden points to several incidents to establish the existence of affirmative misrepresentations by the Internal Revenue Service agents. He does not in any of these, however, establish fraud by clear and convincing proof, rather the evidence tends to show that fraud was not present.

Audit and Examination. Prudden seeks to distinguish *Spahr* and *Sclafani* because in those cases no affirmative acts of misrepresentation were shown. On the other hand, Prudden claims that Cohen's statement at the hearing that "we informed Mr. Prudden that we had come for an audit and examination of his returns—his son's returns, and the returns of the Florida Corporation of America and its eight subsidiaries" was affirmative misrepresentation in the case at bar. Telling Prudden that an audit and examination were to take place is not deceptive. That is exactly what the agents did.

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27. Jett v. Zink, 362 F.2d 723, 729 (5th Cir. 1966), cert. den., Chamberlain v. Zink, 385 U.S. 987, 87 S.Ct. 597, 17 L.Ed.2d 448 (1967).

They audited and examined his books. That in so doing they uncovered incriminating evidence does not change the character of the investigation they undertook. Audit and examination is but one means of gathering evidence in a tax fraud case. Since the agents did not have to warn him directly that they were undertaking a criminal investigation, then telling him the means by which they were to gather evidence in no way is misleading.

Letters from Lexow to Prudden. Prudden contends that the two letters from Lexow fraudulently misrepresented the nature of the inquiry. The July 9th letter, which was written before the Intelligence Division came into the case but while Lexow was preparing to refer it to them, asked Prudden to send records of one of FCA's subsidiaries to him in order to facilitate his examination and to save Prudden time.[28] There are no misrepresentations of fact in the letter. Even if the letter had been misleading, Prudden complains of no evidence obtained as a result of it. In fact, the record does not show that he ever complied with the letter's request. Furthermore, the trial court's suppression order only applied to evidence obtained on or after August 14, a full month after the writing of the letter.

The second letter was written on August 28,[29] two weeks after the referral of the case to the Intelligence Division without advising him of any change in the nature of the investigation. There is no evidence of guile by Lexow. He testified that he was only conscientiously trying to leave a complete record of all the facts he had previously accumulated for his successor. The documents he requested were those which Prudden had already authorized him to copy, but he had

28. This letter is set out at note 3 *supra*.

29. This letter is set out at note 4 *supra*.

inadvertently left them in Prudden's office. Thus, nothing new was added to the government's case. Furthermore, the evidence received pursuant to this letter was exempted from the suppression order by the trial court, to which Prudden did not object. Secondly, Prudden contends that the letter was deceptive since Lexow's reference to the transfer of the case to Revenue Agent Stanley was calculated to raise no suspicion and specific mention that Special Agent Cohen of the Intelligence Division would henceforth be in charge of the investigation was omitted. Lexow testified that his omission of the Special Agent's assignment to the case was not made because he was afraid of the flow of information would be cut off. The only possible harm in this letter would be that Prudden would think that the entry into the case of a different agent was of no significance. Whatever momentary misapprehension in this direction that was left in Prudden's mind by the letter should have been quickly dispelled by the actual appearance not only of Revenue Agent Stanley but also Special Agent Cohen. In place of one neophyte, two experienced agents appeared and persisted in an examination and audit for fifteen months. At any rate, this contention falls far short of persuading us that the letter was fraudulent.

Friendliness of the Agents. Prudden argues that the nature of the investigation was concealed because of the friendliness and cordiality of the relationship between himself and the agents. Most of the evidence he cites as proof of deceit through cordiality is with regard to Lexow. Here again we are reminded that none of the information gathered by Lexow is subject to suppression. Even with regard to the more businesslike attitudes adopted by Cohen and Stanley, we perceive no possible subterfuge. We can see no reason why civil servants should be required in their daily dealings to assume an uncivil character just because they are in a position to discover criminality on the part of a citizen. That would be

a poor form of warning at best. If direct warnings are unnecessary, then requiring circuitous warnings by the manner of action of the agents is irrational. Furthermore, the tone of every interpersonal relationship is subject to the control of all the parties. Prudden's own conduct was a necessary ingredient of the amicable relationship of which he now complains. It may well be that kindness on a taxpayer's part could be calculated to dispel an agent's suspicions or to help to persuade him to see the results of his investigation in the most favorable light. By this we only mean to observe that "it takes two to tango".

Promises and Advice. Prudden further argues that promised advice from the agents, another manifestation of their "deceptive" cordiality, was fraudulent. He first claims that Lexow said that he would advise him on how to handle one feature of a particular stock sale involving a 52,800 dollar escrow account. Lexow promised Prudden an answer when he knew all the facts. But Lexow left the investigation without giving Prudden any answer. So Lexow's promise was not deceitful. Prudden also pressed Cohen and Stanley for advice in regard to the same transaction but admits that he got no "recognizable answer." The long and short of this is that none of the agents ever gave him any advice on the escrow transaction. How could this deceive him? Prudden also claims that the failure of the agents to advise him that he should file an amended return in 1963 was misleading. He asked Cohen if he should file an amended return and was told that the agents would consider only his original return in preparing their report. This is no more than a factual statement. It was not shown to be false or deceitful.

Cumulative Misrepresentations. The explication of a case in factual and legal segments can distort the overall picture of what really happened. Therefore, we have carefully reviewed the record as a whole but still cannot find that Prud-

den sustained his burden of proving fraud, deceit and trickery. Goodman v. United States, 283 F.Supp. 245 (C.D.Cal. 1968), which was relied on by the District Court is distinguishable. Most noticeably, in that case the taxpayer had only a grammar school education and was affirmatively led to believe that the information which he was giving the revenue agents was part of the investigation of another taxpayer. That is not near this case on either count.

Any reasonable person is bound to be aware that the filing of an incorrect tax return may result in a charge of wrongdoing. If common sense and knowledge are not enough, then the warning at the bottom of every tax form which the taxpayer must sign before filing, should suffice.[30] The appearance of the revenue agent at the door, in itself, ought in no way to dispel this knowledge of a potential criminal charge. Rather, when the agent says he is there to examine the taxpayer's books, the taxpayer's concern should intensify. We find it entirely implausible for Prudden, a well-educated businessman with a law degree and experience in the tax field, to claim that he did not know that the investigation could lead to criminal charges and that after fifteen months of investigation by numerous special agents of his affairs in New York and Florida, he was surprised or shocked to find himself in a criminal case. When the record is taken most favorably to Prudden's position it falls markedly short of demonstrating by clear and convincing evidence that he was the victim of fraud, deceit or trickery. The suppression order is reversed and the case is remanded to the district court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

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30. The warning states: "Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief it is true, correct, and complete."

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

HORTON R. PRUDDEN,

Defendant-Appellee.

(June 26, 1970)

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

Before BROWN, Chief Judge, COLEMAN and CLARK, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

PREME COURT, U. S.

Supreme Court, U.S.
FILED
AUG 28 1970
E. ROBERT SEAVER, CLERK

No. 453

In the Supreme Court of the United States

OCTOBER TERM, 1970

HORTON R. PRUDDEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
JEROME M. WALDMAN,
Assistant Attorney General,
JOSEPH M. HOWARD,
RICHARD A. BUHRMAN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner is under an indictment charging 17 counts of crimes against the revenue, including wilfully attempting to evade income taxes (26 U.S.C. 7201) and wilfully subscribing to false income tax returns filed for his sons (26 U.S.C. 7206(4)). Petitioner, a well educated businessman with a law degree, moved to suppress evidence obtained from him by Treasury agents on the theory that they "misled the defendant into believing that they were merely conducting an audit to determine his tax liability," thereby securing his unwitting cooperation. After an evidentiary hearing the district court ordered suppression. It found that the agents had not advised petitioner of his constitutional

rights or that they were conducting a criminal investigation, and that they had committed affirmative acts of deceit designed to lull petitioner into the belief that only a determination of his correct tax liability was involved.

The government appealed pursuant to 18 U.S.C. 3731, and the court of appeals reversed. It held that petitioner had failed to sustain his burden of proving fraud or deceit by the IRS agents in obtaining records (Pet. App. 25–31) and that they had no affirmative duty to advise him of his rights or that their investigation might have criminal consequences (Pet. App. 12–25).

1. Petitioner contends that the court of appeals misplaced the burden of proof on the question whether his production of records was obtained by fraud or deceit as to the scope of the tax investigation. He asserts that production of these records was protected by the Fourth Amendment and that the government, as in consent searches of dwellings, bore the burden of disproving fraud or deceit. *Bumper* v. *North Carolina*, 391 U.S. 543, 548–549. This case does not, however, involve the policy of protecting the privacy of the home, which explains the exception in *Bumper* to the general rule that the party moving to suppress evidence bears the burden of proving that it was illegally obtained. *Nardone* v. *United States*, 308 U.S. 338, 341. This case, rather, involves the voluntary production of business and tax records, as to which the individual's interest of privacy is significantly less and the government's interest in examining the records is greater. See *Jus-*

lice v. *United States*, 390 U.S. 199. Moreover, as the court of appeals held, the evidence shows that there was no fraud or deceit.

2. The court of appeals held that petitioner was not entitled to Miranda warnings at the time when a special agent entered the investigation because he was neither in custody nor otherwise deprived of his freedom in any significant way (Pet. App. 22). This is in accord with the rule in the Fifth Circuit, *Agnellino* v. *United States*, 409 F. 2d 833, 835, certiorari denied, 396 U.S. 824, and in seven other circuits, *Morgan* v. *United States*, 377 F. 2d 507, 508 (C.A. 1); *United States* v. *White*, 417 F. 2d 89 (C.A. 2), certiorari denied, 397 U.S. 912; *United States* v. *Squeri*, 398 F. 2d 785, 788–790 (C.A. 2); *United States* v. *Cafiello*, 420 F. 2d 471 (C.A. 2), certiorari denied, 397 U.S. 1039; *United States* v. *Mancuso*, 378 F. 2d 612, 618 (C.A. 4), certiorari denied, 390 U.S. 955; *United States* v. *Miriani*, 422 F. 2d 150, 153–154 (C.A. 6), certiorari denied, June 22, 1970, No. 1546, O.T. 1969; *United States* v. *Mains*, 378 F. 2d 716, 718–719 (C.A. 6), certiorari denied, 389 U.S. 905; *Cohen* v. *United States*, 405 F. 2d 34 (C.A. 8), certiorari denied, 394 U.S. 943; *Feichtner* v. *United States*, 389 F. 2d 498 (C.A. 9); *Housley* v. *United States*, 406 F. 2d 481, 484 (C.A. 10).

Petitioner contends that these holdings, including the one in the case at bar, are in conflict with *United States* v. *Dickerson*, 413 F. 2d 1111 (C.A. 7). In *Dickerson*, the court upheld a suppression order on the ground that a taxpayer must be given *Miranda* warn-

ings "at the inception of the first contact with the taxpayer after the case has been transferred to the Intelligence Division" (p. 1117), but it made its holding applicable only to "interrogations taking place after the date of this decision," July 28, 1969 (p. 1117). Thus, even if the *Dickerson* rule were applied to the case at bar the evidence would not be suppressible because it was obtained in 1963 and 1964.

In view of the purely prospective nature of the *Dickerson* holding and the present policy of the Internal Revenue Service to give virtually full *Miranda* warnings to all taxpayers when they are first interviewed by a special agent,[1] there should be few, if any, future cases which will meet a different fate in the Seventh Circuit than in any other circuit. See *United States* v. *Campione*, 416 F. 2d 486 (C.A. 7), certiorari denied, 397 U.S. 909; *United States* v. *Gallagher*, C.A. 7, No. 18,000, and *United States* v. *Townsend*, C.A. 7, No. 18,159, both decided July 9, 1970. The conflict, therefore, does not warrant further review by this Court.

3. There was no duty, aside from *Miranda* and *Dickerson*, to advise of the possible criminal consequences of the investigation as petitioner contends (Pet. 18–22). Treasury agents are required only to

[1] By news release dated November 26, 1968, the Internal Revenue Service announced that henceforth a special agent on his first visit to a taxpayer must warn him of his constitutional rights, including the right to counsel, but not including the proffer of legal aid unless the taxpayer is in custody. The news release notes that this "new procedure goes beyond most legal requirements that are designed to advise persons of their rights." 1968 CCH Fed. Tax Reporter, par. 6946; 1968 Prentice-Hall Fed. Taxes, par. 55,476.

advise a taxpayer that they are concerned with the accuracy of his returns. In this advice, there is inherent a warning that they will pursue evidence of misreporting without regard to the shadowy line between evasion and avoidance. *United States* v. *Schiffani*, 265 F. 2d 408, 414–415 (C.A. 2), certiorari denied, 360 U.S. 918; *Greene* v. *United States*, 296 F. 2d 841, 842–843 (C.A. 2); *United States* v. *Ercoli*, 245 F. 2d 284, 286 (C.A. 3), certiorari denied, 355 U.S. 819; *Turner* v. *United States*, 222 F. 2d 926, 930–932 (C.A. 4), certiorari denied, 350 U.S. 831; *Montgomery* v. *United States*, 263 F. 2d 887, 892–893 (C.A. 5); *Biggs* v. *United States*, 246 F. 2d 40, 44 (C.A. 6); *Zachey* v. *United States*, 227 F. 2d 249, 225–226 (C.A. 8), certiorari denied, 350 U.S. 923. In any event the court of appeals, after a careful examination of the undisputed facts, properly concluded that it was "entirely implausible" that petitioner was unaware of the possible criminal consequences of this investigation (Pet. App. 34).

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
JOHNNIE M. WALTERS,
Assistant Attorney General.
JOSEPH M. HOWARD,
RICHARD B. RUHRMAN,
Attorneys.

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In The Supreme Court of the United States

OCTOBER TERM, 1970

No. 453

HORTON R. PRUDDEN,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

CHESTER BEDELL
Counsel
C. HARRIS DITTMAR
Counsel of Record
1520 Barnett Bank Building
Jacksonville, Florida 32202
For Petitioner

BEDELL, BEDELL, DITTMAR, SMITH & ZEHMER
1520 Barnett Bank Building
Jacksonville, Florida 32202
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The Government's memorandum in opposition attempts to distinguish this Court's decision in *Bumper* v. *North Carolina* (1968), 391 U.S. 543, 88 S.Ct. 1788; 20 L.Ed. 2d 797, by contending that the rule stated in *Bumper* relates to "consent searches of dwellings," whereas the instant case "involves the voluntary production of business and tax records," and "does not . . . involve the policy of protecting the privacy of the home." (Memorandum, p. 2). The attempted distinction is unwarranted, illogical and invalid -- the Fourth Amendment provides that not only "houses," but also "papers," shall be "secure . . . against unreasonable searches." Moreover, the Government's memorandum overlooks the fact that in the instant case part of the search was conducted in a garage apartment of petitioner's mother. Thus, Revenue

Agent Stanley, who joined the investigation when Special Agent Cohen took it over, testified:

> "A On March the 19th, '64 - which was Thursday, I was over there. And the place we're speaking of was - I believe it's 171 Clark Avenue, which is a room - a part of a garage apartment of his mother - Mr. Prudden's mother.
>
> "Now, on March the 19th, '64 - Thursday - I was there. On March the 25th, '64 - which was Wednesday - I was there; I have a record of that.
>
> "And March the 27th, '64 - which was Friday.
>
> "Q Back in the garage loft?
>
> "A Yes, sir.
>
> "Now, any of those dates, I might have been in the office and the garage; but I have a record of those dates being at the garage."
>
> (Appendix to Appellant's Brief in the United States Court of Appeals for the Fifth Circuit, pp. 135, 136.)

Bumper involved a search of petitioner's grandmother's house which produced a gun that had been used in a slaying. This Court held that the Government had the burden of proving that consent to the search was voluntarily given and was not obtained by fraud or deceit. (391 U.S. at 548-49; 88 S.Ct. at 1792.) The instant case involves a search of petitioner's mother's garage apartment which produced bank statements, deposit slips, checks and other records. The Court of Appeals for the Fifth Circuit held that the petitioner had the burden of proving that consent to the search was ob-

tained by fraud, deceit or trickery (App. 27, 30). The two cases cannot be distinguished and the conflict in decisions is real and irreconcilable.

The petition for writ of certiorari should be granted.

Respectfully submitted,

CHESTER BEDELL
Counsel

C. HARRIS DITTMAR
Counsel of Record

1520 Barnett Bank Building
Jacksonville, Florida 32202

For Petitioner

BEDELL, BEDELL, DITTMAR, SMITH & ZEHMER
1520 Barnett Bank Building
Jacksonville, Florida 32202
Of Counsel